

*United States Court of Appeals
for the Second Circuit*



APPENDIX

Signed B
R5

74-1036

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY TRUST COMPANY, Executor
of the Will of Frederick A.
Lockwood, Deceased,

Plaintiff-Appellee
v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

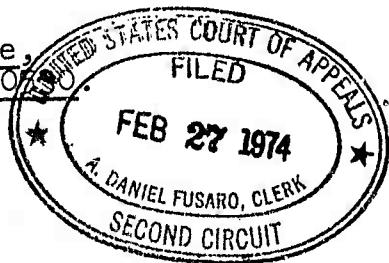
APPENDIX

SCOTT P. CRAMPTON,
Assistant Attorney General,

MEYER ROTHWACKS,
DONALD H. OLSON,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530

Of Counsel:

STEWART JONES,
United States Attorney.



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[3-57]

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE		ATTORNEYS		
CITY TRUST COMPANY, Executor of the Will of Frederick A. Lockwood, Decceased		For plaintiff: Louis Ciccarello Lovejoy, Cunco & Curtis 168 East Avenue Norwalk, Conn. 06851		
vs	South			
UNITED STATES OF AMERICA				
For defendant: Stanley W. Tamm U.S. Attorney Federal Building 915 Lafayette Blvd. Bridgeport, Conn.				
Daniel Dineen Roger P. Thomasch Tax Division Department of Justice Washington, D. C.				
STATISTICAL RECORD	COSTS	DATE 1970	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed	Clerk	4/27	Lovejoy, Cunco & Curtis	\$15.00
J.S. 6 mailed	Marshal	4/30	Deposit: C. F. 100069	15.00
Basis of Action: Action to Docket fee recover estate taxes alleged to have been erroneously and illegally assessed and collected by defendant. Depositions collected by defendant. \$192,949.48				

DATE	PROCEEDINGS	Date Order or Judgment Noted
1970		
4/27	Complaint filed. Summons issued and together with copies of same and or complaint, handed to the Marshal for service.	
5/5	Appearance of Richard J. Winter, Assistant U.S. Attorney, on behalf of Plaintiff, U.S.A.	
5/7	Plaintiff's Motion for Summary Judgment, filed. Summons and Complaint, filed.	
6/30	Stipulation filed, that Defendant shall have to and including August 27, 1970 within which to answer or otherwise respond to the complaint. Ordered Accordingly, Earl, C. M-6/30/70. Copies mailed to Counsel of Record.	
8/26	Answer, filed by Defendant.	
12/23	Placed on Court Trial List.	
1/1		
1/8	Pre-Trial Memorandum, filed by Defendant.	
4/15	Copies of Proposed Preliminary Pre-Trial Order mailed to Attys. Ciccarello, Jones, Dineen and Thomasch.	
4/27	Pre-Trial Order, entered. LATIMER, M. So Ordered ZAMPANO, J. M-4/20/71 (Conf. 4/14/71). Copies mailed to Attorneys Ciccarello, Dineen and Thomasch.	
1/2		
4/3	Interrogatories, filed by the Defendant.	
8/15	Request for Admissions, filed by the Defendant.	
8/28	Motion for Summary Judgment, filed by the Defendant.	
"	Brief in Support of Motion for Summary Judgment, filed by the Defendant.	
9/13	Pre-Trial Order, entered. LATIMER, M. So Ordered NEWMAN, J. M-9/14/72. (conf. 9/12/72) Cross Motions for Summary Judgment to be filed and heard on 11/6/72 Mot. Cal. Copies mailed to Attys. Ciccarello and Dineen. Copy to AHL.	
9/29	Stipulation of Facts, filed.	
10/4	Motion for Amendment of Pretrial Order, filed by the Defendant.	
10/11	Defendant's Motion For Amendment of Pretrial Order, so ordered. LATIMER, M. M-10/12/72. Copies mailed to Attys. Winter and Ciccarello.	
10/17	Plaintiff's Motion for Summary Judgment, filed.	
10/17	Plaintiff's Brief in Support of its Motion for Summary Judgment, filed.	
11/2	Reply Brief for the Defendant, filed.	
11/7**	Recording of Proceeding before Latimer, M., 11/6/72, filed.	
11/6	Hearing on Plaintiff's Motion for Summary Judgment. Decision Reserved. Latimer, M.	
1973		
5/3	Memorandum of Decision on Cross-Motions for Summary Judgment. Latimer, M. So Ordered Newman, J. M-5/1/73. Plaintiff's Motion for Summary Judgment - GRANTED. Defendant's Motion for Summary Judgment - DENIED. ORDERED counsel to file Stip. for Judgment within 30 days in an agreed-upon amount in plaintiff's favor on the claim for refund. Plaintiff may file unopposed further claim to count of Complaint within 10 days of entry of this ruling & defendant's answer is to be served and filed within 10 days thereafter. Clerk directed to enter judgment upon submission of stipulation. Copies to counsel and to MJB, TJC, RCZ, JOT, AHL & J. Conn. Law Review.	

City Trust Company, Executor, vs. United States

D. C. 110 Rev. Civil Docket Continuation

D. C. 110 Rev. Civil Docket Continuation	
DATE	PROCEEDINGS
5/18	Letter from the plaintiff requesting an extension of time for the filing of the stipulation of judgment until June 18, 1973.
5/18	Endorsement entered on plaintiff's letter: "5/18/73 Extension through 6/18/73 granted in accordance with the reported joint request of counsel." Lattimer, M. M-5/22/73. Counsel notified.
6/11	"Extension to 7/24/73 granted in accordance with the joint request of counsel for good cause shown." Lattimer, M. M-6/11/73. Copies to counsel. (Endorsement of letter from defendant on behalf of both parties requesting extension of time for submission of agreed judgment, letter dated 6/8/73.)
7/30	Judgment, entered. Zampino, J. Ordered that plaintiff recover of the defendant taxes paid of \$174,522.95 and interest paid of \$22,974.59, a total of \$197,497.53, with interest thereon in accordance with law and its costs of action. Copies to counsel. M-8/1/73
9/24	Notice of Appeal, filed by defendant. Copies to counsel.
9/25	Certified copy of docket sheets and Notice of Appeal (copy) forwarded to D. Fusaro, Clerk, U.S.C.A., New York, N.Y. Certified Mail No. 173600.
11/7	Defendant's Motion for Extension of the Time for Transmission of the Record, filed.
11/7	Memorandum of Defendant in Support of its Motion for Extension of the Time for Transmission of the Record, filed.
11/7	ORDER, filed and entered, granting an extension of fifty days of the time for transmission of the record on appeal. Newman, J. Copies to counsel and to A. Daniel Russo, Clerk, U.S.C.A. M-11/12/73 (certified)

FILED

APR 27 3 00 PM '70

U. S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CITY TRUST COMPANY, Executor of
the Will of Frederick A. Lockwood,
Deceased,)
Plaintiff,) Civil Action
vs.) File No. B-57
UNITED STATES OF AMERICA,) Complaint
Defendant,)

1. Plaintiff, a Connecticut banking corporation, is the executor under the will of Frederick A. Lockwood, deceased. The plaintiff brings this action against the United States of America to recover estate taxes erroneously and illegally assessed and collected by the defendant from the plaintiff. Jurisdiction is conferred upon this Court by 28 U.S.C. Sec. 1346 (a) (1), and Sec. 1340.

2. Frederick A. Lockwood died a resident of Norwalk, Connecticut, on May 21, 1966. He left a last will and testament, which was duly admitted to probate in the Probate Court for the District of Norwalk, to which jurisdiction in that behalf belonged, and on May 31, 1966, letters testamentary were duly issued out of said court to the plaintiff, who duly qualified as executor of said will and still is acting as such executor.

3. The plaintiff has a just claim against the defendant for \$192,949.68, together with interest as provided by law, which sum was paid by the plaintiff, as executor of said

estate, to the defendant through the duly appointed, qualified and acting District Director of Internal Revenue at Andover, Massachusetts, as hereinafter set forth. The claim is founded upon the federal estate tax sections of the Internal Revenue Code of 1954, particularly Sec. 2055 (a) (2), 26 U.S.C. 2055 (a) (2).

4. On or about August 17, 1967, the plaintiff filed the federal estate tax return of said estate showing due a tax of \$322,649.27 which was paid with the return. A charitable deduction was claimed for 50% of the remainder of the trust created by Article 3 of the will. The amount of this interest was computed to be \$479,539.72.

5. The claimed deduction was disallowed by the Internal Revenue Service on the ground that the trustee's power to invade the principal of the trust created under Article 3 of the decedent's will for the happiness of the surviving wife prevented the charitable interest from falling within §2,055 of the Internal Revenue Code of 1954. On May 15, 1968, a notice of deficiency in the amount of \$169,975.10 was mailed to the plaintiff.

6. The plaintiff, under threat of said deficiency and to avoid additional interest, duly paid said deficiency, plus \$22,974.58 interest, on or about December 11, 1969, to the District Director of Internal Revenue, Andover, Massachusetts.

7. On or about December 17, 1969, the plaintiff filed Form 843, its claim for refund of said amounts, with the Internal Revenue Service, a copy of which claim is attached hereto as Exhibit A.

8. On March 19, 1970, the plaintiff filed Form 3363, Acceptance of Proposed Disallowance of Claim for Refund or Credit, and Form 2297, Waiver of Statutory Notification of Claim Disallowance, with the Internal Revenue Service at its request.

9. The denial of the charitable deduction was erroneous because the language of the will provides an ascertainable standard for invasion of the trust corpus and the possibility of such invasion was so remote as to be negligible. At the time of the decedent's death, his wife, Alice Drew Lockwood, was in her eighties, her needs were well established, and her own estate was quite capable of satisfying her needs.

10. No part of the sum claimed has been refunded to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant, the United States of America, for the sum of \$192,949.48, together with interest as provided by law.

Lovejoy, Cuneo and Curtis
By Louis Ciccarello

Attorneys for Plaintiff
163 East Avenue, Norwalk, Conn.

P.O. Box 720, South Norwalk, Conn.
06856

[Exhibit omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

CITY TRUST COMPANY, Executor)
of the Will of Frederick A.)
Lockwood, Deceased,)
Plaintiff)
v.) CIVIL ACTION NO. B-57
UNITED STATES OF AMERICA,) [Filed August 26, 1970]
Defendant)

ANSWER

Comes now defendant, United States of America, by its attorney, Stewart H. Jones, United States Attorney for the District of Connecticut, and in response to the complaint answers as follows:

1. Admits the allegations of paragraph one, sentence one of the complaint. Admits the allegations of paragraph one, sentence two of the complaint, except denies that estate taxes were erroneously and illegally assessed and collected by defendant. Admits the allegations of paragraph one, sentence three of the complaint.

2. Admits the allegations of paragraph two, sentences one and two of the complaint.

3. Denies the allegation of paragraph three, sentence one of the complaint that plaintiff has a just claim against defendant and defendant is presently without knowledge or information sufficient to permit it to admit or to deny the remaining allegations of paragraph three, sentence one of the complaint. Admits the allegations of paragraph three, sentence two of the complaint.

[- 2 -]

4. Denies the allegations of paragraph four, sentence one of the complaint and answering further states that the return was filed on August 21, 1967, and that the amount of estate tax shown due thereon was \$332,649.27. Admits the allegations of paragraph four, sentence two of the complaint. Admits the allegation of paragraph four, sentence three of the complaint that the claimed charitable deduction was in the amount of \$470,538.72.

5. Admits the allegations of paragraph five, sentence one, except answering further states that Section 2055 of the Internal Revenue Code of 1954 is involved. Admits the allegations of paragraph five, sentence two of the complaint.

6. Defendant is presently without knowledge or information sufficient to permit it to admit or to deny the allegations of paragraph six of the complaint.

7. Admits the allegations of paragraph seven of the complaint, except denies each and every material allegation of Exhibit A to the complaint unless otherwise specifically admitted herein.

8. Admits the allegations of paragraph eight of the complaint.

9. Denies the allegations of paragraph nine, sentence one of the complaint. Defendant is presently without knowledge or information sufficient to permit it to admit or to deny the allegations of paragraph nine, sentence two of the complaint.

10. Admits the allegations of paragraph ten of the complaint.

- 9 -

[- 9 -]

WHEREFORE, defendant demands judgment dismissing the complaint with prejudice and awarding costs of this action to defendant.

United States Attorney

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

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CITY TRUST COMPANY, Executor
of the Will of Frederick A.
Lockwood, Deceased,

CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

Plaintiff

v.

CIVIL ACTION NO. B-57

UNITED STATES OF AMERICA,

Defendant

DEFENDANT'S REQUEST FOR ADMISSIONS

Comes now the defendant, United States of America, by its attorney, Stewart H. Jones, United States Attorney for the District of Connecticut, pursuant to Rule 36 of the Federal Rules of Civil Procedure and requests plaintiff to admit within 30 days after service hereof and for purposes of this action only that the attached document is a true and correct copy of the respective original document and that the facts set forth herein are true:

1. A copy of the last will and testament of Frederick A. Lockwood is attached hereto as Exhibit A.
2. This is the last will and testament referred to in paragraph 2 of the complaint.

8/17/72

cc: Dept. of Justice
Tax Division
Chief, Refund Trial Section No. 1
Washington, D.C. 20530
Ref. No. SPC:DAW:SJC:ontos:pck 5-14-3071

STEWART H. JONES
United States Attorney

BY: HOWARD C. ECKENRODE
ASSISTANT UNITED STATES ATTORNEY

[Certificate of Service omitted]

I, FREDERICK A. LOCKWOOD, of Pine Hill Road, East Norwalk, within the City of Norwalk, County of Fairfield and State of Connecticut, make this will and revoke all other wills heretofore made by me.

1

If I survive my wife, ALICE DREW LOCKWOOD, I give and bequeath to RIVERSIDE CEMETERY ASSOCIATION, a corporation existing under and by virtue of a special Charter granted by the State of Connecticut, and located in Norwalk, the sum of Fifteen Hundred Dollars (\$1500.00), to hold, manage, invest and reinvest the same and to use the income therefrom, with other moneys already provided, for the maintenance and repair of the F. St. John Lockwood mausoleum located on lot #1, Section 19, in the Cemetery of said Association.

2

Any and all of my jewelry, clothing and other purely personal effects, any and all of my furniture and household goods, furnishings, tools and equipment, including, but not limited to, rugs, pictures, blankets, linens, bric-a-brac, books, utensils, cutlery, flat and hollow silverware and ornaments, and my automobile, I give and bequeath to my dear wife, ALICE DREW LOCKWOOD, to be hers absolutely.

3

All of the rest, residue and remainder of my property, real and personal, of whatsoever the same may consist and whereever it may be situated, I do, devise and bequeath to my trustee hereinafter named, IRON TRUST, NEW YORK,

for the following uses and purposes: to hold, manage, sell, invest and reinvest the same and to pay the net income therefrom to or for the benefit of my dear wife, MARY DREW LOCKWOOD, during her life. My trustee may, in its absolute and unhampered discretion, pay so much of the principal of this trust as it may deem to be necessary for the proper care, comfort, welfare and happiness of my wife. It is my desire that my wife may occupy her own home and live in the manner to which she has been accustomed in our life together so long as she desires to do so, and that she shall have from my estate at least Five Hundred Dollars (\$500.00) a month from the date of my death, with payments to begin as soon after my death as is practicable, for her own personal spending money and for whatever she may desire, after the payment of all of her necessary expenses. I direct my executor and trustee to begin to make regular monthly payments to my wife on account of the income which is due or will become due to her as soon after my death as it is practicable to do so.

At the death of my wife, the net income of the trust shall be paid as follows: one-half thereof shall be paid to my sister, JULIA BILDEN LOCKWOOD; and the other half shall be paid, in equal shares, to the children of my deceased sister, Elizabeth Lockwood Hubbard, to wit: MARY HUBBARD LUCAS, ANNABEL HUBBARD HEMINGWAY and FRANK LATHON HUBBARD, or their issue, per stirpes.

At the death of the survivor of my wife and my sister, JULIA BILDEN LOCKWOOD, this trust shall cease and the principal of the trust, plus any accrued and accumulated

income remaining in the hands or under the control of my trustee, shall be paid over and distributed by my trustee as follows:

- a. Fifty per cent. (50%) thereof, in equal shares, to the children of my sister, ELIZABETH LOCKWOOD HUBBARD, to wit: CAROLYN HUBBARD LUCAS, ANNABEL HUBBARD HEMINGWAY and FRANK LANGDON HUBBARD, or their issue, per stirpes.
- b. Ten per cent. (10%) thereof to the FIRST CONGREGATIONAL CHURCH on the Green, Norwalk, Connecticut, to create a fund in memory of my parents, COLONEL FREDERICK ST. JOHN LOCKWOOD and CARRIE AYRES LOCKWOOD, to be added to and managed as an integral part of the permanent endowment of the Church, the income therefrom to be used for the general purposes of the Church.
- c. Five per cent. (5%) thereof to YALE UNIVERSITY, New Haven, Connecticut, to create a fund in memory of my parents, COLONEL FREDERICK ST. JOHN LOCKWOOD and CARRIE AYRES LOCKWOOD, to be added to and managed as an integral part of the permanent endowment of the University, the income therefrom to be used for its School of Music.
- d. Five per cent. (5%) thereof to YOUNG MEN'S CHRISTIAN ASSOCIATION OF NORWALK, INCORPORATED, Norwalk, Connecticut, to create a fund in memory of my parents, COLONEL FREDERICK ST. JOHN LOCKWOOD and CARRIE AYRES LOCKWOOD, to be added to and managed as an integral

part of the permanent endowment of the Association, the income therefrom to be used for the general purposes of the Association.

e. Ten per cent. (10%) thereof to THE LANGDON HUBBARD MEMORIAL HOSPITAL, Bad Axe, Michigan, to create a fund in memory of my parents, COLONEL FREDERICK ST. JOHN LOCKWOOD and CARRIE AYRES LOCKWOOD, to be added to and managed as an integral part of the permanent endowment of the Hospital, the income therefrom to be used for the general purposes of the Hospital.

f. Twenty per cent. (20%) thereof to THE NORWALK HOSPITAL ASSOCIATION, INCORPORATED, Norwalk, Connecticut, to create a fund in memory of my parents, COLONEL FREDERICK ST. JOHN LOCKWOOD and CARRIE AYRES LOCKWOOD, to be added to and managed as an integral part of the permanent endowment of the Hospital, the income therefrom to be used for the general purposes of the Hospital.

4

I appoint CITY TRUST COMPANY, a banking corporation organized and existing under the laws of the State of Connecticut and having an office in Norwalk, in said State, to be the executor of this will and trustee of the trust created hereunder. As executor and trustee, acting in either or both capacities, in re-affirmance of and in addition to the powers, authority and discretion implicit in any provision made elsewhere in this will or conferred upon it by law, it shall have full power, authority and discretion:

a. To lease, sell and exchange any and all of my real and personal property not herein specifically

bequeathed or devised, or any property acquired by it, upon such terms and conditions as may be acceptable to it.

- b. To determine what property coming into its possession shall be considered as income or principal and to apportion any charges and expenses incurred by it in performance of its duties as executor and trustee between income and principal, which determination and apportionment shall fully protect my executor and trustee in respect to any and all actions taken by it or payments made by it in reliance thereon.
- c. To make any division or distribution called for in this will and to do so in money, securities or other property. It may transfer to the distributees undivided interests in any securities or other property and it shall not be necessary that all beneficiaries have equal interest in any particular security or property. Its judgment as to what is a fair distribution in accordance with the terms of this will shall be final and conclusive upon all persons concerned therewith.
- d. To retain any investment held by me at the time of my death and to make such investments and re-investments as it may deem to be wise and prudent in any property, including, but not limited to, bonds, notes, debentures, mortgages, certificates of deposit, mortgage participation certificates, common or preferred stocks, and shares or interests in investment trusts,

without being limited to securities in which trustee are authorized or required to invest funds.

e. To consent to and participate in any plan of reorganization, consolidation, merger, combination or other similar plan, and to consent to contract, lease, mortgage, sale or purchase by any corporation pursuant to such plan.

f. To deposit any property with any protective, reorganization or similar committee and to delegate any discretionary power thereto, and to pay part of its expense and compensation.

g. To exercise all conversion, subscription, voting and other rights, and to grant proxies, discretionary or otherwise.

h. To extend the time of payment of any obligation held by it and to compromise and settle, upon such terms as to it may seem proper, any claim in favor of or against my estate or the trust created by this will.

i. To borrow on the general credit of my estate, with or without pledging the assets thereof, for the purpose of paying any taxes levied or assessed against my estate and the property passing by this will, the debts of my estate, and the expenses of administering my estate.

It is my wish and desire that my executor and trustee consult with my wife from time to time with relation

to the business of my estate, in the trust herein established to the end that she will be kept informed of the progress of administration and the business and affairs of my estate and said trust.

6

The word "issue" as used in this will shall include any children adopted prior to the date of this will.

7

I direct: that any and all state and federal inheritance, succession, estate, transfer and death taxes on or with respect to my estate and the property passing by this will or otherwise shall be paid from my estate as an expense of administering it; that there shall be no pro-rataion of any such taxes; and that no person shall have any duty whatsoever to reimburse my estate therefor.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, at Norwalk aforesaid, this 25th day of January, A.D., 1962.

/s/ FREDERICK A. LOCKWOOD (L.S.)

Subscribed, sealed, published and declared by the said FREDERICK A. LOCKWOOD as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

WILLIAM H. STILWELL of YORWALL, CT

JOHN LOVEJOY of NEW HAVEN, CT

PEGGY S. HANFORD of YORWALL, CT

STATE OF CONNECTICUT, }
COUNTY OF FAIRFIELD, } ss. Norwalk, January 25th, 1962.

We, MARJORIE W. STILWILL,

JONATHAN LOVEJOY and ROGER S. HANFORD,
being severally duly sworn, depose and say that we, each of
us, saw FREDERICK A. LOCKWOOD, the within named testator,
subscribe and seal the foregoing and annexed instrument, and
heard him publish and declare the same to be his last will
and testament; that at his request, we, each of us, subscribed
said instrument as attesting witnesses in his presence,
and in the presence of each other; that the said FREDERICK
A. LOCKWOOD appeared to us to be, and as we verily believe
was, of sound, disposing mind and memory at the time when
said instrument was so executed and attested; and that we
make this affidavit at the request of the said FREDERICK A.
LOCKWOOD.

MARJORIE W. STILWILL

JONATHAN LOVEJOY

ROGER S. HANFORD

Subscribed and sworn to at Norwalk, in said County,
this 25th day of January, 1962, before me,

FRED. C. LOVEJOY JR.
Commissioner of the Superior Court.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

CITY TRUST COMPANY, Executor)
of the Will of Frederick A.)
Lockwood, Deceased,)
Plaintiff)
v.) CIVIL ACTION NO. B-57
UNITED STATES OF AMERICA,) [Filed September 29, 1972]
Defendant)

STIPULATION OF FACTS

Come now the plaintiff and the defendant, by their respective attorneys and stipulate and agree for purposes of this action only that the following facts are true and that the documents attached hereto are true and correct copies of the respective original documents. The parties reserve the right to offer additional evidence not inconsistent with the facts set forth herein.

1. Frederick L. Lockwood died a resident Norwalk, Connecticut, on May 21, 1966. He left a last will and testament, a copy of which has been filed. It was duly admitted to probate in the Probate Court for the District of Norwalk.

2. On May 31, 1966, letters testamentary were duly issued by said court to the plaintiff, who duly qualified as executor of said will and still is acting as such executor.

3. On August 21, 1967, plaintiff filed the federal estate tax return and paid the tax shown due thereon. A charitable deduction was claimed for fifty percent of the remainder of the trust created by article three of the will.

4. The District Director of Internal Revenue disallowed the

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claimed charitable deduction. As a result, on November 28, 1969, additional tax of \$169,975.10 was assessed against the plaintiff. The tax along with interest of \$22,974.58, or a total of \$192,949.68 was paid on December 15, 1969.

5. On December 17, 1969, plaintiff filed a claim for refund of the additional taxes and interest paid, a copy of which is attached to the complaint and is incorporated herein by reference.

6. On March 19, 1970, plaintiff agreed to disallowance of the claim for refund and waived notice of the disallowance.

7. This action was timely instituted on April 27, 1970.

8. The decedent's wife, Alice Drew Lockwood, was born on September 18, 1885, and she is presently 87 years of age. Her life expectancy at the date of the decedent's death was 5.5 years and today is 3.8 years.

9. At the time of the decedent's death and at present, Mrs. Lockwood's personal estate, which consists of stocks, bonds, savings accounts and unencumbered real estate, totaled over \$500,000.00. She lives a quiet and sedentary life and her income from all sources exceeds her expenditures. From the date of the creation of the trust, the possibility of the Trustee invading the trust corpus for her benefit was, and is, so remote as to be negligible.

10. When a final verdict is rendered, whether the verdict be for the plaintiff or for the defendant, plaintiff shall submit to defendant information pertaining to the amount of attorney's fees paid or to be paid by the estate in connection with this litigation and if the amount is reasonable, defendant shall have the

[3]

Internal Revenue Service compute the amount of refund to which plaintiff is entitled and shall submit the computation to plaintiff for approval. If any dispute arises with respect to the reasonableness of the attorney's fee or the computation of the refund, the matter shall be brought before the Court on appropriate motions.

LOVEJOY, CUNEO and CURTIS

By Louis Ciccarello

Louis Ciccarello, Esq.
168 East Avenue
Norwalk, Connecticut
P. O. Box 720, South Norwalk,
Connecticut 06856
Attorney for Plaintiff

STEWART H. JONES
UNITED STATES ATTORNEY

By Stephen J. Csontos
Stephen J. Csontos, Esq.
Tax Division
Department of Justice
Washington, D.C.
Attorney for Defendant

FILED

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U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CITY TRUST COMPANY,
Executor of the Will of
Frederick A. Lockwood,
Deceased,

Plaintiff

VS.

UNITED STATES OF AMERICA,
Defendant

***** CIVIL ACTION NO. B-57 ✓

MEMORANDUM OF DECISION ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

This action is brought by the plaintiff executor pursuant to 28 U.S.C. § 1346(a)(1) for refund of federal estate taxes paid by reason of denial of a charitable deduction claimed under 26 U.S.C. § 2055 for one-half of the remainder of a testamentary trust. The trust corpus was subject to possible diversion to noncharitable private use by a lifetime income beneficiary, and the essential question presented by the pending cross-motions for summary judgment is whether the language of decedent's will defined an objective, ascertainable standard controlling the trustee's power to invade corpus.

The facts material to determination of that issue are undisputed. Decedent Frederick A. Lockwood died a resident of Norwalk, Connecticut on May 21, 1966; his will was probated in Norwalk, and plaintiff was appointed executor. The will provided in part for the creation of a trust for the benefit of

decedent's wife, Alice Drew Lockwood, with trust income to her during her life and thereafter to one of decedent's sisters and a nephew and two nieces; upon the death of the survivor of Mrs. Lockwood and decedent's sister, the trust was to terminate, with one-half of the remaining amount of principal and of any accumulated income to be paid over to the nephew and nieces and the other half to be distributed among several named charitable institutions. The will also contemplated possible payment of principal to Mrs. Lockwood during her lifetime, as shown by the following portion of Article 3:

"My trustee may, in its absolute and unhampered discretion, pay so much of the principal of this trust as it may deem to be necessary for the proper care, comfort, welfare and happiness of my wife. It is my desire that my wife may occupy her own home and live in the manner to which she has been accustomed in our life together so long as she desires to do so, and that she shall have from my estate at least Five Hundred Dollars (\$500.00) a month from the date of my death, with payments to begin as soon after my death as is practicable, for her own personal spending money and for whatever she may desire, after the payment of all of her necessary expenses."

In computing the taxable estate, deduction of charitable bequests is authorized by 26 U.S.C. § 2055(a)(2), and the federal estate tax return filed by plaintiff in 1967 apparently claimed fifty percent of the trust corpus as a charitable deduction. This suit followed in due course upon the government's disallowance of the claimed deduction and its collection of a resulting tax deficiency in the amount of \$169,975.10, together with \$22,974.58 interest.

Prior to amendment of § 2055 by the Tax Reform Act of 1969 (§ 201(d)(1), 83 Stat. 560-61, amending 26 U.S.C. § 2055(e)), the value of a charitable remainder interest like the one created by the Lockwood will was deductible "only in-

sofar as . . . presently ascertainable, and hence severable from the noncharitable interest", Treas. Reg. § 20.2055-2(a) (1958) (26 CFR § 20.2055-2(a)); as judicially formulated, the threshold test of deductibility in this case is whether the will expresses a sufficiently objective standard governing exercise of the trustee's power to divert corpus to private use by Mrs. Lockwood to have enabled accurate calculation at the time of her husband's death of the amount which would ultimately be available to the charitable beneficiaries. See Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 598-600 (1949) (per curiam); Merchants Nat'l Bank of Boston v. Commissioner of Internal Revenue, 320 U.S. 256, 261-263 (1943); Ithaca Trust Co. v. United States, 279 U.S. 151, 154 (1929). As recently stated by Judge Moore in a succinct review of the major pertinent cases,

"[t]he central inquiry in determining whether the language of split-interest trusts creates a presently ascertainable charitable remainder interest is whether the principal can be invaded only for purposes the determinants of which are known or known to be remote." Hartford Nat'l Bank & Trust Co. v. United States, 467 F.2d 782, 784 (2 Cir. 1972).

Accordingly, the charitable remainder interest is deemed "presently ascertainable" if the will clearly limits invasion of corpus to support of the income beneficiary's accustomed standard of living, see, e.g., Ithaca Trust Co. v. United States, supra, an objective standard which may also include express contemplation of unusual demand "resulting from limited kinds of externally caused emergencies" such as illness, Lincoln Rochester Trust Co. v. McGowan, 217 F.2d 287, 292 (2 Cir. 1954), and not "presently ascertainable" if the will permits dissipation of principal for such purely sub-

jective ends as the "happiness" of the income beneficiary, see, e.g., Merchants Nat'l Bank of Boston v. Commissioner of Internal Revenue, *supra*.

An unusual feature of the Lockwood will is that the relevant language set forth above presents not simply a single key word or phrase -- of obvious meaning in common English usage or in the light of settled authorities, or furnished definite meaning by the overall context -- but rather an aggregation of at least superficially ill-matched phrases and terms. Despite initial reservation, the Court is persuaded that the instrument at issue adequately manifests decedent's intent to guarantee his wife's continued enjoyment of her habitual standard of living -- and no more.

The basic grant of power to the trustee is to invade principal to the extent perceived "necessary for the proper care, comfort, welfare and happiness" of Mrs. Lockwood as life beneficiary. Connecticut law is of potentially critical significance to this Court's scrutiny of the will, since the state courts would ultimately determine the limits upon a power to invade trust corpus, see Lincoln Rochester Trust Co. v. Commissioner of Internal Revenue, 181 F.2d 424, 426 (2 Cir. 1950), and there is no doubt that in Connecticut phrases such as "necessary for the proper care, [and] comfort" establish an objective standard of invasion limited at the outside to support in conformity with the widow's "circumstances or station of life", Hartford-Connecticut Trust Co. v. Eaton, 36 F.2d 710, 711 (2 Cir. 1929). Mere addition of the word "welfare" would not erode that standard, cf. Hartford Nat'l Bank & Trust Co. v. United States, supra at 786, Salisbury v.

United States, 377 F.2d 700, 706 (2 Cir. 1967), but the final inclusion of possible considerations of "happiness" is naturally suspect.

The word "happiness" is not necessarily of crucial weight in this single integrated phrase, cf. id., n. 8 at 705, but does introduce an element of uncertainty in the reading of intent perhaps satisfactorily resolved only by the discovery of further instructions to the trustee either requiring substantial justification for depletion of corpus, see United States v. Powell, 307 F.2d 821, 826-828 (10 Cir. 1962), or compelling preference for the life beneficiary's desires over the interests of the remaindermen, see Merchants Nat'l Bank of Boston v. Commissioner of Internal Revenue, supra. Cf. Estate of Ford v. Commissioner of Internal Revenue, 53 T.C. 114 (1969), aff'd, 450 F.2d 878 (2 Cir. 1971) (per curiam).

In this case, the cryptic operative phrase is given definitive content by the will's immediately subsequent expression of decedent's wish "that my wife may occupy her own home and live in the manner to which she has been accustomed in our life together so long as she desires to do so" Standing alone, that clear-cut statement would be dispositive, but the difficult aspect of the instant controversy is that decedent apparently engaged in attempted definition of Mrs. Lockwood's standard of living in terms arguably susceptible of construction as importing a broad power of invasion. The clause just quoted is followed by another envisaging possible payment from corpus of "at least Five Hundred Dollars (\$500.00) a month . . . for her own personal spending money and for whatever she may desire, after the payment of all of her

necessary expenses."

Although the parties apparently agree that this of course is not a command to invade corpus in the first instance and Connecticut does adhere to the rule that any payment of principal is ordinarily conditioned upon prior exhaustion of income, see Frey v. Greenberg, 151 Conn. 663, 667, 202 A.2d 142 (1964), the government argues with some force that in the event circumstances require resort to principal, there is no maximum restriction upon invasion for purely subjective purposes and ends of the life beneficiary over and above maintenance of her normal mode of life, cf. United States v. Commercial Nat'l Bank of Kansas City, 404 F.2d 927, 930-932 (10 Cir.), cert. denied, 393 U.S. 1000 (1968). The flaw in that reasoning is that while "necessary expenses" should not perhaps be taken to mean expenditures indispensable to mere subsistence, neither should the phrase be regarded as the equivalent of more generally framed terms such as "necessary for support" which may embrace the full range of demands implicit in maintenance of an appropriate -- and perhaps the accustomed -- standard of living, see Hartford-Connecticut Trust Co. v. Eaton, supra, Hooker v. Goodwin, 91 Conn. 463, 99 A. 1059 (1917), cf. Conn. Gen. Stat. § 42-250, Baldwin v. Tradesmens Nat'l Bank, 147 Conn. 656, 661-662, 165 A.2d 331 (1960), but rather as delimiting a budget area of "necessaries". This concept is itself relative to the life beneficiary's economic station, yet would generally connote a level of expenses below that required to secure fully a customary way of living, "to suitably maintain . . . [the wife] in as much comfort as she now enjoys", Ithaca Trust Co. v. United States, supra at 154.

With "necessary expenses" so viewed, the additional monthly payment appears as no more than an approximation of the disposable income needed by Mrs. Lockwood to underwrite her style of life. State court construction of intent underlying a testamentary trust would in part involve consideration of the family's circumstances, cf. Connor v. Hart, 157 Conn. 265, 275, 253 A.2d 9 (1968), and the Lockwoods' obvious wealth certainly suggests the minimum of \$500 a month to be more likely a modest estimate of the wife's pattern of "personal spending" than an open-ended invitation to unaccustomed extravagance. In this light, identification of the supplemental payment as "for her own personal spending money and for whatever she may desire" is correctly interpreted further by plaintiff as only a prudent bar to any assumption by the trustee of an otherwise possible duty or power to dictate precise choices better left to the personal judgment and tastes of the wife. That qualifying language cannot be reasonably construed more expansively as a general direction to consider Mrs. Lockwood's "happiness" a matter of priority above the charitable beneficiaries' interests in conservation of the trust corpus, compare Merchants Nat'l Bank of Boston v. Commissioner of Internal Revenue, supra, or as effectively granting her the power to command payment of principal without reference to need as defined by her established standard of living, compare, cf., Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 276-281, 170 A.2d 130 (1961).

In short, a perhaps unfortunate prolixity cannot obscure the fact that this is on close examination the ordinary case of a husband's seeking to insure his wife's continued enjoy-

ment of a settled way of life. Moreover, this Court is of the firm opinion that in finding and enforcing decedent's intent Connecticut's tribunals would not pluck the isolated words "happiness" and "desire" from the will's controlling context of explicit concern with preservation of Mrs. Lockwood's customary standard of living so as to permit private excess to displace charitable expectations.

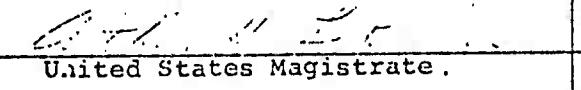
The extreme unlikelihood that Mrs. Lockwood would actually sanction or demand any disposition of the trust corpus to the detriment of the charitable beneficiaries of course has not been considered in determining whether the will articulates a standard precluding hypothetical invasion of principal on subjective grounds. See Henslee v. Union Planters Nat'l Bank & Trust Co., supra at 599-600. With such an objective standard discerned, however, it is clear that the claimed charitable deduction should have been allowed in its entirety, for the parties agree as a matter of fact that in view of Mrs. Lockwood's advanced age, quiet mode of life and substantial personal wealth, "the possibility of the Trustee invading the trust corpus for her benefit was, and is, so remote as to be negligible" -- amply sufficient assurance that the trust's principal will be held intact for ultimate distribution to the remaindermen. Cf. Treas. Reg. § 20.2055-2(b) (1958) (26 CFR § 20.2055-2(b)); compare Estate of Schildkraut v. Commissioner of Internal Revenue, 368 F.2d 40, 48 (2 Cir. 1966).

There being no genuine issue as to any material fact, and plaintiff being entitled to judgment as a matter of law, pursuant to Rule 56(c), Fed. R. Civ. P., plaintiff's motion for summary judgment is hereby granted and defendant's motion for

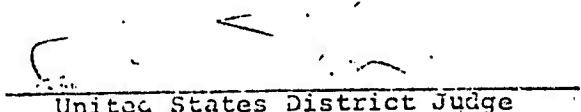
summary judgment is accordingly denied. Counsel are hereby ordered to file with the Clerk of Court within thirty days after entry of the within memorandum and order a stipulation for judgment in an agreed-upon amount in plaintiff's favor on the pleaded claim for refund.

The parties have additionally agreed in principle to a refund reflecting allowance of an estate administration expense deduction for reasonable "attorney's fees paid or to be paid by the estate in connection with this litigation". Cf. 26 U.S.C. § 2053(a)(2); 26 CFR § 20.2053-3(c)(2) (1972). Plaintiff may preserve that as yet unpledged further claim for any necessary hearing by service and filing of an additional count to the complaint within ten days following entry of the instant ruling, and defendant's answer thereto is to be served and filed within ten days thereafter. Cf. Rule 15(a)-(b), Fed. R. Civ. P. A failure to reach prompt and full agreement on that incidental issue, however, shall not constitute just reason for delayed disposition of the principal claim, and the Clerk is hereby directed to enter judgment on the complaint's original or first count forthwith upon submission of the above-mentioned stipulation. See Rule 54(b), Fed. R. Civ. P.; cf. Old Colony Trust Co. v. United States, 300 F. Supp. 1032, 1036 (D. Mass. 1969), aff'd, 423 F.2d 601 (1 Cir. 1970).

Dated at New Haven, Connecticut, this 30th day of April 1973.


United States Magistrate.

SO ORDERED


United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

CITY TRUST COMPANY, Executor)
of the Will of Frederick A.)
Lockwood, Deceased,)
Plaintiff)
v.)
UNITED STATES OF AMERICA,)
Defendant)
CIVIL ACTION NO. D-57
[Entered July 30, 1973]

JUDGMENT

This action was heard by the Court, Honorable Jon O. Newman, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED, that the plaintiff, City Trust Company, Executor of the Will of Frederick A. Lockwood, Deceased, recover of the defendant, United States of America, taxes paid of \$174,522.95 and interest paid of \$22,974.58, a total of \$197,497.53, with interest thereon in accordance with law and its costs of action.

/s/ Jon O. Newman

United States District Judge

APPROVED AS TO FORM:

LOUIS CICCARELLO
LOUIS CICCARELLO, Esquire
Attorney for Plaintiff

STEPHEN J. CAVANOS
STEPHEN J. CAVANOS, Esquire
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

SEP 24 1973

CITY TRUST COMPANY, Executor
of the Will of Frederick A.
Lockwood, Deceased,

U.S. DISTRICT COURT
BRIDGEPORT, CONNECTICUT

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. B-57

NOTICE OF APPEAL

Notice is hereby given that the United States of America,
defendant above named, hereby appeals to the United States
Court of Appeals for the Second Circuit from the final judgment
entered in this action on the 30th day of July, 1973.

Dated: September 24, 1973

STEWART H. JONES
United States Attorney

By: ROBERT M. WEINSTEIN
Assistant United States Attorney

CERTIFICATE OF SERVICE

It is hereby certified that service of this record appendix has been made on opposing counsel by mailing four copies to him on this 22d day of January, 1974, in an envelope, with postage prepaid, properly addressed to him as follows:

Louis Ciccarello, Esquire
Lovejoy, Cuneo & Curtis
168 East Avenue
South Norwalk, Connecticut 06851

me

MEYER ROTHWACKS,
Attorney.